EDITOR'S NOTE

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ORIGINAL

NO. 87-1972

IN THE

SUPREME COURT OF THE UNITED STATES

VERNON LEE BOUNDS, et al.,

Petitioners,

v.

ROBERT (BOBBY) SMITH, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should exercise its certiorari jurisdiction in order to review the concurrent findings of fact by both the District Court and the Court of Appeals that Petitioners share responsibility with their counsel for "a decade-old pattern of neglect and delay" since this Court's decision in this case in Bounds v. Smith, 430 U.S. 817 (1977), and have proven themselves "unable or unwilling to comply with a plan submitted and approved more than ten years ago" in a manner consistent with minimum constitutional requirements.

2. Whether the District Court abused its discretion in denying Petitioners' motions for reconsideration upon a finding, upheld by the Court of Appeals, that Petitioners had not made a sufficient showing of extraordinary circumstances or excusable neglect because they shared responsibility with their attorney for their decade-old pattern of neglect and delay that demonstrated that they were unwilling or unable to implement their plan in a manner consistent with minimum constitutional requirements.

3. Whether a District Court has the equitable authority to order state officials to take additional measures to comply with their constitutional obligation upon a finding, supported by the evidence and upheld by the Court of Appeals, of changed circumstances resulting from the fact that through "a decade-old pattern of neglect and delay" the state officials had proven themselves unwilling or unable to comply in a manner consistent with minimum constitutional requirements with an earlier plan approved by this Court and that the additional measures were necessary in order to assure compliance.

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STATEMENT OF THE CASE

Respondents initiated these consolidated class actions over 15 years ago. North Carolina at that time had taken no steps to provide its prisoners with any assistance in their access to the courts, in violation of Younger v. Gilmore, 404 U.S. 15 (1971). By the time this Court decided these cases more than 11 years ago, Bounds v. Smith, 430 U.S. 817 (1977), North Carolina was one of only a handful of states that had ignored this constitutional responsibility. Bounds v. Smith, supra, Brief for Respondents at 33, Exhibit B. By December 19, 1977, the Court of Appeals observed: "We assume that by now the State has implemented its plan, or will do so shortly." Davis v. Lewis, No. 77-2231 (4th Cir. Dec. 19, 1977). That hope was forlorn. Since then the Court of Appeals on three separate occasions has held that North Carolina has not shown that it was in compliance with its constitutional obligation. Smith v. Bounds, 841 F.2d 77 (4th Cir. 1988) (in banc), adopting Smith v. Bounds, 813 F.2d 1299 (4th Cir. 1987); Harrington v. Holshouser (III), 741 F.2d 66 (4th Cir. 1984); Harrington v. Holshouser (II), 598 F.2d 614 (4th Cir. 1979) (unpublished) (A. 1-38.) In 1979, a unanimous panel of the Court of Appeals in this case held that "the state defendants had the burden of proving the constitutional adequacy of their implementation of the plan which they proposed and with which they were ordered to comply," and that they had not done so. Harrington v. Holshouser (II), supra. (A. 1-5.) In 1984, another unanimous panel of the Court of Appeals held, again in this case, that Petitioners still had not carried their burden of demonstrating compliance with their plan and their constitutional obligation. Harrington v. Holshouser (III), supra. (A. 6-13.) Accordingly, the Court of Appeals found it necessary again to remand the case to the District Court to "determine whether the state has established a prison library system in a constitutionally sufficient manner." Id. at 70. (A. 12.) The Court observed: "Thus, seven years after the Supreme Court decision in Bounds v. Smith, the same legal action remains still unresolved on this appeal despite [Respondents'] efforts, through a series of petitions and motions, to ensure compliance with the Supreme Court's mandate." 741 F.2d at 67. (A. 8.) Two years later the District Court reconfirmed: "As Judge Sprouse put it in

Harrington v. Holshouser, 741 F.2d 66, 69 (4th Cir. 1984), '[a] description of the State's efforts . . . is a chronology of failure.'" Smith v. Bounds, 657 F.Supp. 1322, 1327 (E.D. N.C. 1986). (A. 594.) The District Court found that Petitioners failed on two separate fronts: (A) Petitioners' primary failure was substantive: Petitioners' "plan for assuring adequate law library facilities has been in existence for over a decade, yet they have consistently failed to implement that plan in a constitutionally adequate manner." Smith v. Bounds, 610 F.Supp. 597, 602 (E.D. N.C. 1985). (A. 60.) Petitioners' other failure was procedural: "(T)hroughout the course of this litigation the state has failed to comply with a number of this court's orders." (A. 571.) At the hearing in this case the District Court asked the Chief Deputy Attorney General of North Carolina: "Don't you think there is some merit in the Court's indictment of your side of this versus some--a lot of foot dragging?" He responded: "Your Honor, I agree 100 percent." (Fourth Cir. App. 564X.)

On remand in the District Court, Petitioners made no effort to show compliance. Petitioners' responsibility under the Court of Appeals' 1979 and 1984 decisions was to come forward with such a showing without the necessity of an additional order from the District Court. Although Petitioners did nothing to satisfy that burden, the District Court was exceedingly patient in waiting for them to do so.

Respondents filed several documents attempting to encourage Petitioners to take action in response to their obligation, including on November 9, 1984 a Motion for Order Compelling Defendants To Report on Their Compliance With Their Constitutional Obligations, and on November 28, 1984 a Submission of Summary of the Compliance Stage of This Litigation. When Petitioners did not respond to those documents or otherwise make any showing, the District Court still exhibited patience and did not foreclose Petitioners' opportunity to make the necessary showing, as it might well have done then. Instead, the District Court on December 21, 1984 issued its own order directing Petitioners to show that they were in compliance or -- still patiently -- shortly would be.

Petitioners submitted no response to that order and the deadline passed.

Respondents then filed two more documents: On January 29, 1985, Plaintiffs' Motion for Judgment; and on March 1, 1985, Plaintiffs' Submission

With Regard to Remedy. In addition, counsel for Respondents approached counsel for Petitioners on two occasions to remind him of his obligation to respond, to encourage him to do so, and, if he needed additional time, to urge him to make a formal request to the Court, authorizing him on the first occasion to represent that Respondents would not object. Petitioners still made no appearance in the District Court.

Finally, after waiting nearly five months the District Court issued its order of May 14, 1985 finding that for over a decade Petitioners had "consistently failed to implement that plan in a constitutionally adequate manner" in three important respects. The District Court expressly found that Petitioners "are not in compliance with their constitutional obligation to provide inmates of the North Carolina prisons with adequate assistance in their access to the courts." 610 F.Supp. at 603. (A. 62.) There can be no dispute that the record before the District Court permitted no other conclusion.

The District Court further found: The State "has proven itself unable or unwilling to insure that its law libraries are constitutionally adequate to meet its inmates' needs. Therefore, some alternative method must be found. For the reasons set out hereinbefore, the court today concludes that method must include, in some form, the assistance of counsel." The District Court decided that its order was "in complete harmony with the Supreme Court's decision in Bounds v. Smith." 657 F.Supp. at 1326. (A. 592).

Petitioners then on June 13, 1985 filed a Motion for Reconsideration pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. On July 29, 1985 the District Court issued an order carefully considering Petitioners' motion and denying it on the ground that the papers submitted by Petitioners "have totally failed to show exceptional circumstances in this case." 657 F.Supp. 1322, 1324. (A. 572.) Although Petitioners concede that their counsel committed one serious instance of "apparent contempt," Petition at 6, the District Court found that Petitioners had committed twelve separate substantial defaults stretching over the years of the compliance phase of this litigation. Thus, the total failure of Petitioners to respond in any fashion to the District Court's December 21, 1984 order was in no sense aberrational. It fit a consistent, deliberate pattern. As the District Court found: "The

case proceeded in this manner throughout." 610 F.Supp. at 599. (A. 55.) See also, 610 F.Supp. at 601. (A. 59): "As with past orders, [Petitioners] filed no response" to the December 21, 1984 order. The Chief Deputy Attorney General even conceded at the hearing: "Your Honor was more tolerant than I would have been had I been sitting in Your Honor's Seat." The District Court made clear that its decision was based on the entire pattern of Petitioners' litigation strategy of neglect and delay and not just the failure to comply with its December 21, 1984 order: "The state's failure to comply with the December, 1984 order was quite simply the straw that broke the camel's back and showed that the state has been unwilling or unable to comply with a plan submitted and approved more than ten years ago." 657 F.Supp. at 1324. (A. 572.)

Petitioners filed a second motion for reconsideration on December 10, 1985. On January 13, 1986 the District Court denied that motion for the reasons set forth in its order denying Petitioners' first motion for reconsideration. (A. 585.)

The Court then scheduled a hearing for February 10, 1986 for consideration of the new plans submitted by the parties, as directed in the May 14 order. At the hearing, counsel for Petitioners asked the Court again to reconsider its May 14 order. The District Court entertained that request and discussed Petitioners' reconsideration request with their counsel and with counsel for Respondents. The District Court promised: "I will think about it some more."

Three days later, on February 13, 1986, Petitioners filed a third motion for reconsideration. After giving the matter the further thought that it had promised, the District Court on March 11, 1986 issued an order denying the motion, in which it explained: "The court indicated that it would permit defendants to file their renewed motion, largely because it has raised concerns which the court feels may have not been fully addressed in prior orders." 657 F.Supp. at 1325. (A. 590.) After thoughtful discussion of the issues presented by the third motion for reconsideration, the District Court concluded -- as it had in denying the first motion for reconsideration -- that Petitioners shared responsibility with their counsel for their failure to demonstrate compliance with their constitutional obligation. The District Court noted that Petitioners repeatedly failed, over a protracted period,

timely to respond to the court's orders, which Petitioners could not blame solely on their counsel. The District Court therefore denied the motion. 657 F.Supp. at 1327. (A. 594-595).

The Court of Appeals affirmed the District Court decision, first by a unanimous panel, 813 F.2d 1299 (A. 14-27), then, on rehearing, by an 8-4 decision of the in banc court. 841 F.2d 77. (A. 28-38.) The panel opinion described the status of the case as follows:

> "Since the Supreme Court spoke in 1977, the thrust of this litigation has been to require North Carolina to meet these minimum standards. North Carolina, as was its option, sought to bring itself into compliance by the establishment of 'adequate law libraries,' but it never succeeded in establishing a program that would survive scrutiny by the district court and by us. As we observed in 1984 'seven years after the Supreme Court decision in Bounds v. Smith, the same legal action remains still unresolved on this appeal despite [Respondents'] efforts, through a series of petitions and motions to ensure compliance with the Supreme Court's mandate." Harrington II, 741 F.2d at 67.
>
> "After we last remanded the case in 1984, the district court by order entered on December 21, 1984 required [Petitioners] to submit materials, within thirty days, to show that "they are or shortly will be in compliance with their plan [to provide adequate law libraries]." When [Petitioners] failed to respond, the district court made a careful analysis of North Carolina's proposals then before it and concluded that they were constitutionally deficient in at least three respects . . . . Having found the 'state's inability or an unwillingness to implement its plan,' the district court concluded that it must decree some form of assistance from trained attorneys, and on May 14, 1985 it filed its opinion indicating that it would grant such relief. 610 F.Supp. 597."

813 F.2d at 1301. (A. 18.)

The Court of Appeals also agreed with the District Court that Petitioners'

> "neglect was part of a decade-old pattern of neglect and delay. In Harrington II, we characterized 'the State's efforts in this area' as 'a chronology of failure.' 741 F.2d at 69. As the district court stated below, 'The [Respondents] cite eleven other instances where [Petitioners] failed to respond to the court's orders. The state's failure to comply with the December 1984 order was quite simply the straw that broke the camel's back ... Clearly, the [Petitioners] knew or should have known that counsel had a history of failing to respond to the court's orders.'
>
> 'The history of the defendants' neglect of its duties in this case, as recounted by the district court, is set forth in the margin. We find it correctly described."

813 F.2d at 1304-1305. (A. 24-25.) [That history is discussed in Appendix A.]

In upholding the District Court's decision, the panel opinion concluded with the following important observation:

> "Consistent with its role and function as a court, the district court could not sanction this extensive history of nonfeasance. Even when a sovereign state is a litigant, there comes a time when further delay cannot be tolerated. In this case, that time was well past. Cf. Green v. County School Board, 391 U.S. 430, 439 (1968)."

813 F.2d at 1305. (A. 26.)

The in banc majority adopted the panel opinion. 841 F.2d at 77. (A. 29). In addition, it supplemented that opinion with the following:

> "Defendants contend that they presented a case of excusable neglect under Rule 60(b), F.R. Civ. P., justifying relief from the May 14, 1985 order, decreeing that the state must provide assistance to prisoners by trained attorneys, and permission to reopen the case in order to show that North Carolina had a constitutionally acceptable prisoner library program. We note two significant factual findings by the district court in rejecting this contention. First, in denying defendants' initial motion for reconsideration, the district court concluded that defendants had not shown excusable neglect because 'defendants' failure to respond to the December 21, 1984 order was not an isolated incident. Clearly, defendants knew or should have known that counsel had a history of failing to respond to the court's orders.'
>
> "Similarly when the district court denied defendants' second renewed motion for reconsideration, it dealt with defendants' argument that while Safron's dereliction in failing to respond to the December 21, 1984 order was not excusable neglect, their failing to respond was excusable because Safron's omission was an isolated incident which neither defendants nor Safron's supervisors could have anticipated. Again it found that 'actions of counsel which precipitated the May 14, 1985 order and opinion were not isolated incidents.' It noted that 'the state had failed eleven other times over the course of this litigation to timely respond to this court's orders.... Thus, the state's failure to comply with the court's orders cannot be laid solely at Mr. Safron's door ... [T]he court concludes that defendants must share the responsibility for counsel's failure to provide the court with sufficient information to determine the adequacy of the law library plan.'
>
> "Coupled with these factual findings is the district court's finding, described in the panel opinion and reiterated by the district court in its opinion denying the initial motion for reconsideration, that North Carolina was unable or unwilling to implement its library plan consistent with minimum constitutional requirements.
>
> "From the facts of record and for the reasons set forth in the panel opinion as well as our own examination of the record, we conclude that these findings of fact are not clearly erroneous. If, as the district court permissibly found, there was neglect on the part of all of the defendants, it follows that they could not establish 'excusable neglect,' they had no right to reconsideration under Rule 60(b), and the district court correctly denied their repeated motions for reconsideration."

841 F.2d at 77-78. (A. 29-30.)

The four dissenting judges gave two reasons for their dissent. First, they argued that the District Court had gone beyond the mandate of the Court of Appeals' 1984 decision in this case. (The Petition does not advance this argument.) Secondly, they disagreed with the District Court and the majority of the Court of Appeals that "the state 'knew or should have known' what its attorney was doing during the progression of the case." 841 F.2d at 81. (A.

35.) Accordingly, they reasoned: "Not only is the record devoid of any action by the State, as contrasted with its attorney, which would indicate any recalcitrance or footdragging, it is full of papers which indicate that the State had proceeded to comply with our mandate in Harrington II and that her attorney simply neglected to file the papers. I think that is an exceptional circumstance which warrants relief." 841 F.2d at 82. (A. 38.)

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW THE FINDINGS OF FACT CONCURRED IN BY THE DISTRICT COURT AND THE COURT OF APPEALS.

The usual practice of this Court is to "accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals." NCAA v. Board of Regents, 468 U.S. 85, 98 n.15. (1984). Indeed, "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." Rogers v. Lodge, 458 U.S. 613, 623 (1982). "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Tank and Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949).

The crux of the petition, however, is Petitioners' dispute with the findings of the District Court and the Court of Appeals. Petitioners formulated their statement of the first question presented for review with a statement that "the state officials had timely provided evidence of compliance with their law library plan to their then attorney of record and he, unbeknownst to them, grossly neglected to present it to the court." Petition, page 1. In their Introduction, Petitioners then recite: ". . . the evidence, which was timely made available to their former counsel but which unbeknownst to the defendants was not presented to the district court . . . . their former counsel's dereliction of duty, of which the defendants were unaware, and without reason to be aware." Petition, Page 5; see also Petition, Page 12: "Mr. Safron simply did not present evidence of compliance to the District

Court, and he never advised the defendants that it was his intention to abandon them."

The principal problem with that position is that the District Court and the Court of Appeals found directly to the contrary. The District Court concluded that Petitioners shared responsibility with their counsel for their failure to demonstrate compliance with their constitutional obligation and expressly rejected Petitioners' effort to minimize their misconduct by limiting it to only one single default and then fixing responsibility for that misconduct solely on Safron. 657 F.Supp. at 1327. (A. 594-595.). "Clearly," the District Court found, "defendants knew or should have known that counsel had a history of failing to respond to the court's orders." The District Court made clear that its decision was not based on just the one failure that Petitioners acknowledge. That incident, the District Court found, "was quite simply the straw that broke the camel's back and showed that the state has been unwilling or unable to comply with a plan submitted and approved more than ten years ago." 657 F.Supp. at 1324. (A. 572.) The Court of Appeals described that one incident of misconduct as "part of a decade-old pattern of neglect and delay." 813 F.2d at 1304-1305. (A. 24.) It agreed that Petitioners' failure to comply could not be blamed solely on Safron. 841 F.2d at 78. (A. 30.)

Petitioners do not even acknowledge the findings of the two lower courts that reject the factual position they present to this Court. They do not even acknowledge, let alone discuss or attempt to explain, any of the earlier incidents in the decade-old pattern. Certainly they cannot contend that there is "a very obvious and exceptional showing of error" justifying a departure from this Court's two-court rule if they do not even discuss the findings of the two lower courts or the substantial evidence upon which it is based.

That is a sufficient basis for denying the petition for certiorari. Respondents have, however, included in Appendix A of this Brief a summary of the highlights of the evidence supporting these findings of the District Court and the Court of Appeals. Respondents have also provided in Appendix B a list of other factual assertions in the Petition that either have no support in the record or are contrary to the findings of the District Court and the Court of Appeals.

II.

THIS COURT SHOULD NOT EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PETITIONERS' MOTIONS FOR RECONSIDERATION BECAUSE PETITIONERS' POSITION IS BASED ON AN ASSERTED FACTUAL POSITION THAT IS CONTRARY TO THE FINDINGS OF FACT CONCURRED IN BY THE DISTRICT COURT AND THE COURT OF APPEALS.

The procedural posture of the case is such that the only question on appeal is whether the District Court abused its discretion in denying Petitioners' motions for rehearing after giving them plenary and careful consideration. The Petition states that the motions were based on Rule 60(b) of the Federal Rules of Civil Procedure, but does not specify the section of that rule upon which it relies. Petition at 1. The District found that Petitioners had "totally failed to show exceptional circumstances," 657 F.Supp. at 1324, (A. 572), and the Court of Appeals upheld that conclusion and also found that Petitioners "have not established excusable neglect for purposes of 60(b)(1)." 813 F.2d at 1304. (A. 23.)

Relief under Rule 60(b) requires a showing of "extraordinary circumstances." Ackermann v. United States, 340 U.S. 193, 199 (1950); Klaprott v. United States, 335 U.S. 601, 613 (1949) ("an extraordinary situation"); id. at 616 (Burton, J.) ("special circumstances"). "The remedy provided by the Rule . . . is extraordinary and is only to be invoked upon a showing of exceptional circumstances." Compton v. Alston Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979). "To bring himself within Rule 60(b), the movant must make a showing of . . . exceptional circumstances." Werner v. Carbo, 731 F.2d 204, 206-207 (4th Cir. 1984); see also id. at 209; Inryco, Inc. v. Metropolitan Engineering Co., Inc., 708 F.2d 1225, 1230 (7th Cir. 1983). Rule 60(b)(1) requires, in addition, a showing of "mistake, inadvertence, surprise or excusable neglect."

Moreover, "Rule 60(b) motions are usually left to the sound discretion of the District Court." 11 C. Wright and A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2857 (1973)"; see also National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) ("The question, of course, is not whether this Court, or whether the Court of Appeals would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."); Link v. Wabash Railroad Co., 370 U.S. 626, 633 (1962).

The Petition makes clear that Petitioners' unqualified factual assertion contrary to the findings of both of the courts below is critical to their first point because they incorporate it into their formulation of the question presented just as if it were established. Petitioners contend that their failure to present evidence of compliance was solely attributable to the inexcusable, Petition at 5, "gross negligence," Petition at 11, 13, and "apparent contempt," Petition at 6, 13, of their counsel in the "flouting of the court's order." Petition at 7. They further contend that their counsel's conduct was "unbeknownst" to them and that they "were unaware, and without reason to be aware," of his conduct. Petition at 5. However, the District Court and the Court of Appeals have both expressly rejected that contention. They correctly concluded that the most recent default was part of a "course of protracted neglect," Jackson v. Washington Monthly, 569 F.2d 119, 121 (D.C. Cir. 1977); Fischer v. Dover Steamship Co., 218 F.2d 682, 683 (2d Cir. 1955), and the product of a deliberate strategy, United States v. Erdoss, 440 F.2d 1221, 1223 (8th Cir. 1971), that continued over the course of a decade and that cannot provide a basis for Rule 60(b) relief. "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." Ackermann v. United States, 340 U.S. 193, 198 (1950). Parties cannot freely shift attorneys to test an alternative strategy upon the failure of an irresponsible one. See Dal Int'l Trading Co. v. Sword Line, Inc., 286 F.2d 523, 523, 525 (8th Cir. 1961). As the en banc opinion of the Fourth Circuit summarized:

> "Defendants contend that they presented a case of excusable neglect under Rule 60(b), F.R. Civ. P., justifying relief from the May 14, 1985 order, decreeing that the state must provide assistance to prisoners by trained attorneys, and permission to reopen the case in order to show that North Carolina had a constitutionally acceptable prisoner library program. We note two significant factual findings by the district court in rejecting this contention. First, in denying defendants' initial motion for reconsideration, the district court concluded that defendants had not shown excusable neglect because 'defendants' failure to respond to the December 21, 1984 order was not an isolated incident. Clearly, defendants knew or should have known that counsel had a history of failing to respond to the court's orders.'
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> "Similarly when the district court denied defendants' second renewed motion for reconsideration, it dealt with defendants' argument that while Safron's dereliction in failing to respond to the December 21, 1984 order was not excusable neglect, their failing to respond was excusable because Safron's omission was an isolated incident which neither defendants nor Safron's supervisors could have anticipated. Again it found that 'actions of counsel which precipitated the May 14, 1985 order and opinion were not isolated incidents.' It noted that 'the state

had failed eleven other times over the course of this litigation to timely respond to this court's orders.... Thus, the state's failure to comply with the court's orders cannot be laid solely at Mr. Safron's door ... [T]he court concludes that defendants must share the responsibility for counsel's failure to provide the court with sufficient information to determine the adequacy of the law library plan.'

"Coupled with these factual findings is the district court's finding, described in the panel opinion and reiterated by the district court in its opinion denying the initial motion for reconsideration, that North Carolina was unable or unwilling to implement its library plan consistent with minimum constitutional requirements.

"From the facts of record and for the reasons set forth in the panel opinion as well as our own examination of the record, we conclude that these findings of fact are not clearly erroneous. If, as the district court permissibly found, there was neglect on the part of all of the defendants, it follows that they could not establish 'excusable neglect,' they had no right to reconsideration under Rule 60(b), and the district court correctly denied their repeated motions for reconsideration."

841 F.2d at 77-78. (A. 29-30.)

Thus, two courts have ruled against Petitioners on this factual dispute. This Court should not grant certiorari simply to review a factual issue that was decisively resolved by the District Court in a manner confidently upheld by the Court of Appeals.* Out of an abundance of caution, Respondents

*Even were Petitioners' factual assertion not contradicted by the findings of both lower courts, Petitioners would not be able to show that the District Court abused its discretion in denying their motions for reconsideration. The adversary process requires that courts and opposing parties rely on the attorneys with whom they must deal. Link v. Wabash Railroad Co., 370 U.S. 626, 633-634, 634 n.10 (1962); Strickland v. Washington, 466 U.S. 668 (1984). As this Court recently said in the context of a criminal case:

"Petitioner argues that the preclusion sanction was unnecessarily harsh in this case . . . . Petitioner also contends that it is unfair to visit the sins of the lawyer upon his client. Neither argument has merit.

"More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself. The trial judge found that the discovery violation in this case was both willful and blatant. . . . Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate. . . .

"The argument that the client should not be held responsible for his lawyer's misconduct strikes at the heart of the attorney-client relationship. . . . The adversary process could not function effectively if every tactical decision required client approval. . . . Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision . . . ."

Taylor v. Illinois, 108 S.Ct. 646, 656-657 (1988). Even if Petitioners were only neglectful, they may not claim Rule 60(b) relief on the basis of their attorney's "inexcusable neglect." Inryco, Inc. v. Metropolitan Engineering Co., Inc., 708 F.2d 1225, 1234, 1235 (7th Cir. 1983). Courts allowing Rule 60(b) relief "uniformly require a diligent, conscientious client." Id. at 1234. Cf., Link v. Wabash Railroad Co., 370 U.S. 626, 635-636 (1962): "Nor need we consider whether the District Court would have been abusing its

summarize in Appendix A the highlights of the evidence that supports the lower courts' resolution of this factual question. See also, 813 F.2d 1299, 1305 n.4.

III.

THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE FACTORS NECESSARY FOR GRANTING A RULE 60(B) MOTION RELEVANT TO THIS CASE.

Petitioners erroneously interpret two cases, Naples v. Maxwell, 368 F.2d 219 (6th Cir. 1966); New York State Health Facilities v. Carey, 76 F.R.D. 128 (S.D. N.Y. 1977), to support the extraordinary position that state officials who are represented by the state attorney general have an absolute right to relief from a judgment resulting from a default by their counsel, unlike private litigants for whom the request for relief is addressed to the sound discretion of the District Court. In Naples, an Assistant Attorney General essentially sabotaged the State's case by recommending that a court grant a petition for a writ of habeas corpus. Unlike the present case, the State's attorney took an affirmative position contrary to the State's interest -- and was disciplined for doing so. In allowing Rule 60(b) relief, the Court noted: "The assistant who made the recommendation was discharged by the Attorney General. Uncontradicted evidence, including an affidavit and testimony of the assistant, to the effect that the assistant had no authority to make the recommendation was submitted to the court." Id. at 220. The Sixth Circuit applied no special rule for the state officials, but simply held "that there was neglect of duty on the part of the assistant to the Attorney General, and that this was excusable and could not have been avoided on the part of the Attorney General." Id. In Carey, although stating in dictum that the case was "distinguishable on the critical fact that defendants herein are state officials represented by attorneys in the employ of the state," the court based its decision granting the motion to vacate a default judgment, not on Rule 60(b)(1) or (6), but on Rule 60(b)(4), that the judgment was void because in violation of the eleventh amendment. Indeed, it wrote: "This Court appreciates that the New York State Attorney General's Office is burdened with

*Footnote Continued
discretion had it rejected a motion under Rule 60(b) which was accompanied by a more adequate explanation . . . . No such motion was ever made, so that there is nothing in the record before us to indicate that counsel's failure . . . was other than deliberate or the product of neglect."

a heavy workload. However, this does not excuse its neglect of the matter at hand." Id. at 132.

Neither case suggested that the matter was not a discretionary one for the District Court. In the present case, the District Court gave appropriate consideration to Petitioners' status as state officials. It carefully considered three times Petitioners' motions for reconsideration, including their argument for a special rule of leniency for state officers sued in their official capacities and represented by the Attorney General's office. The District Court's findings of "protracted neglect" with shared responsibility and its consequent exercise of discretion to deny the motions for reconsideration are amply supported by the record and were properly upheld by the Court of Appeals.

IV.

THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE AUTHORITY TO ORDER PETITIONERS TO PROVIDE A PRISONER LEGAL SERVICES PROGRAM AFTER THEY PROVED THROUGH A DECADE-OLD PATTERN OF NEGLECT AND DELAY THAT THEY WERE UNWILLING OR UNABLE TO IMPLEMENT IN A MANNER CONSISTENT WITH MINIMUM CONSTITUTIONAL REQUIREMENTS THEIR PLAN FOR A PRISON LAW LIBRARY PROGRAM WITH TRAINED INMATE PARALEGALS.

Petitioners argue that the District Court's order violated the law of the case established by the decision of this Court in 1977. Not even the dissenting judges on the Court of Appeals accepted this argument.

A. THE BOUNDS v. SMITH MANDATE

In Bounds v. Smith, 430 U.S. 817 (1977), this court held that the Constitution requires North Carolina "to shoulder affirmative obligations to assure all prisoners meaningful access to the courts," 430 U.S. at 824, including assistance "in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Id. at 828. The only question before this Court was "whether States must protect the right of prisoners to access to the courts by providing them with law libraries or alternative sources of legal knowledge." Id. at 817. The Court clearly answered that question in the affirmative. It thus rejected Petitioners' position that their only obligation was not to interfere with their inmates' access to the courts. As it did, the Court had before it Petitioners' plan for satisfying their

constitutional obligation. Id. at 819. Respondents did not at that time oppose Petitioners' plan in any respect, so this Court did not have to consider the adequacy of the plan as presented. Moreover, Petitioners had obtained a stay of their obligation to implement the plan, so this Court could not at that time have considered the adequacy of the plan as implemented, either.

Before this Court, Petitioners took the position that law libraries would be inadequate to assure prisoners meaningful access to the Courts. Id. at 826. The Court, advertent to the broader scope of the plan presented by Petitioners, which included staffing of the law libraries with trained inmate paralegals, disagreed. Id. at 826-827. Furthermore, it emphasized that if Petitioners "had any doubts about the efficacy of libraries, the District Court's initial decision left [Petitioners] free to choose another means of assuring access." Id. at 827. Petitioners' obligation as described by this Court was to assure meaningful access to the courts. The Court recognized that this requirement allowed prison administrators wide discretion within the bounds of their constitutional obligation. Id. at 833. Yet the Court emphasized, "'[M]eaningful access' to the courts is the touchstone." Id. at 823. "Any plan," the Court decided, "must be evaluated as a whole to ascertain its compliance with constitutional standards." Id. at 832.

The issue of legal services for prisoners was not before this Court in Bounds. The Court did, however, go out of its way to note the superiority of legal services programs in this context. Its opinion left little doubt that the Court believed that a legal services program would be the advisable method of assuring prisoners meaningful access to the courts.* Id. at 831-832. The Court took note that professional prison administrators overwhelmingly "supported creation and expansion of prison legal services." Id. at 829-830 n.18. Observing that "[n]early half the States and the District of Columbia provide some degree of professional or quasi-professional legal assistance to prisoners," id. at 830-831, and taking account of the variety of imaginative forms for such programs and the successes achieved by the better ones, the Court said:

*As early as Johnson v. Avery, 393 U.S. 483 (1969), this Court noted with restrained approval the initial efforts to deliver legal services to prison inmates. Id. at 489.

> "Legal services plans not only result in more efficient and skillful handling of prisoner cases, but also avoid the disciplinary problems associated with writ writers . . . . Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that other grievances against the prison or the legal system are ill-founded, thereby facilitating rehabilitation by assuring the inmate that he has not been treated unfairly."

Id. at 831.

Certainly the decision with that language was not holding that a District Court may never order a state to provide a legal services program -- no matter how intransigently or even contumaciously the state acts in connection with its constitutional obligation and no matter what needs are demonstrated for its prisoners -- especially when the question was not before the Court.

The burden of proving clearly, and on the record, the qualitative adequacy of the assistance is on the prison authorities. Harrington v. Holshouser (III), 741 F.2d 66 (4th Cir. 1984); Harrington v. Holshouser (II), 598 F.2d 614 (4th Cir. May 14, 1979), slip op. at 8 (A. 739); Rich v. Zitnay, 644 F.2d 41, 43 (1st Cir. 1981); Cruz v. Hauck, 627 F.2d 710, 719 (5th Cir. 1980). As the District Court held in its May 14, 1985 Opinion Petitioners have not met that burden. They turned their reservations about the efficacy of their law library plan into a self-fulfilling prophecy. Only when it became clear that Petitioners were unable or unwilling to implement their plan did Respondents begin to seek a legal services program as the answer.

B. THE DISTRICT COURT'S EQUITABLE AUTHORITY

The District Court had the equitable authority to assure an effective remedy. Given Petitioners' default, the District Court had "broad power to fashion a remedy." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971); Alexander v. Hill, 707 F.2d 780, 783 (4th Cir. 1983). As this Court said in Hutto v. Finney, 437 U.S. 678, 687 n.9 (1978);

> "As we explained in Milliken v. Bradley, 433 U.S. 267, state and local authorities have primary responsibility for curing constitutional violations. If, however '[those] authorities fail in their affirmative obligations . . . judicial authority may be invoked.' Swann [v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1,] 15. Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'"

Applying that principle to the case before it, this Court used language that may readily be applied to uphold the District Court's order in this case:

> In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation. The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions in the isolation cells. If petitioners had fully complied with the court's earlier orders, the present time limit might well have been unnecessary. But taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.

Hutto v. Finney, 437 U.S. at 687; see generally Ruiz v. Estelle (VII), 679 F.2d 1115, 1145-1146, 1155-1156 (5th Cir. 1982) ("(T)he remedy should begin with what is absolutely necessary. If these measures later prove ineffective, more stringent ones should be considered. . . . (A) court may require remedial measures that the Constitution does not of its own force initially require."); Smith v. Sullivan, 611 F.2d 1039, 1044 (5th Cir. 1980) ("(T)he federal courts have the power, and the duty, to make their intervention effective.").

A court of equity has the power to modify a decree to adapt it to changed circumstances, and upon appropriate findings of violation has a duty to prescribe effective relief. Evans v. Jeff D., 106 S.Ct. 1531, 1537 (1986); Pasadena City Board of Education v. Spangler, 427 U.S. 424, 437 (1976); United States v. United Shoe Machinery Corp., 391 U.S. 244, 251 (1968); United States v. Swift & Co., 286 U.S. 106, 114 (1932). "The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its power and processes on behalf of the party who obtained that equitable relief." System Federation v. Wright, 364 U.S. 642, 647 (1961).

The history of this case from the District Court's 1974 order through its May 14, 1985 order -- including this Court's Bounds decision itself -- has been in this equitable tradition. The District Court proceeded cautiously in this case, permitting Petitioners to formulate the plan for their compliance in the first instance, then generously affording Petitioners ample opportunity over a decade to implement the plan. The Chief Deputy Attorney General at the hearing agreed that the District Court regularly "ruled with the State" and "was very tolerant in the way it handed down its order." Fourth Circuit App. at 568. Only when the District Court became convinced by the experience of too many years of failure and too many defaults by Petitioners did the Court take the next necessary step. Even then the Court called on Petitioners to develop a plan for the prison legal services program, and its order was based

on the plan presented by Petitioners in all respects but one. As the District Court noted, Petitioners' failure over ten years properly to implement their plan "forced this court to conclude that [Petitioners] would not or could not provide inmates adequate access to the courts through the use of law libraries."

> "During the past ten years since the Supreme Court's opinion in Bounds v. Smith, this court has retained jurisdiction over the case to insure that the state met the obligations imposed upon it pursuant to its plan. However, since that time the Court of Appeals has twice held that defendants were not meeting that obligation. After defendants' final failure to respond to the mandate of the Fourth Circuit and to this court's orders, the court was forced to conclude that defendants could not assure inmates adequate access to the courts through its law library plan. The court finds nothing in the Supreme Court's opinion which would prohibit such a finding. Rather, the Supreme Court imposed an affirmative duty on the district courts to evaluate a state's plan to ascertain its compliance with constitutional standards. This is exactly what this court did in the May 14, 1985 opinion, concluding that defendants' failure to properly implement their law library plan rendered that plan constitutionally inadequate and finding that under these circumstances, a plan providing some form of attorney assistance was the only way to assure that the mandate of Bounds v. Smith would be met."

657 F.Supp. at 1326. (A. 593).

The recent decision of this Court in United States v. Paradise, 107 S.Ct. 1053 (1987), speaks with remarkable clarity and precision to this case. The analogy between Paradise and the present case is established by two facts: (1) In both cases, there is a clearly established constitutional violation; for the present case, the finding of such a constitutional violation has already been upheld by this Court. (2) In both cases, there is a history of lack of effort or lack of will to remedy the violation. As an incidential additional fact, in both cases there is a history of improper procedural resistance to the court action to require a remedy. In Paradise that consisted apparently of advancing what the District Court called "'frivolous arguments'." In the present case, there has been that and also much more serious procedural defaults. It is important to note, however, that those procedural defaults have been overshadowed by substantive failures by Petitioners to comply with their constitutional obligation. Thus, the District Court had heard and generously accommodated many times over the years promises by Petitioners about how they were going to comply with their plan, only to have Petitioners repeatedly renege on those promises. The District Court's reaction to Petitioners' motions for reconsideration should be evaluated in light of that history.

Thus, Paradise recognized that the Supreme Court "must acknowledge the respect owed a District Judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment." Id. at 1073. As in Paradise, so in this case:

> "The Government suggests that the trial judge could have imposed heavy fines and fees on the Department pending compliance. This alternative was never proposed to the District Court. Furthermore, the Department had been ordered to pay the plaintiffs' attorney's fees and costs throughout this lengthy litigation; these court orders had done little to prevent future foot-dragging. . . . In addition, imposing fines on the defendant does nothing to compensate the plaintiffs for the long delays in implementing acceptable promotion procedures. . . .
>
> "By 1984 the District Court was plainly justified in imposing the remedy chosen. Any order allowing further delay by the Department was entirely unacceptable."

107 S.Ct. at 1068-1069.

The present case is an easier case than Paradise in one important respect. The remedy ordered by the District Court in this case is forward-looking only. The remedy in Paradise endeavored also to eliminate the present effects of past violations. This aspect of Paradise is what gave the case any difficulty it had, and led the four dissenters to disagree with the majority position. The dissenters were concerned with the effect of the Paradise remedy "on the rights of nonminority troopers." Id. at 1082. The absence of that complicating feature from this case makes the District Court's order even more appropriate for affirmance.

CONCLUSION

Petitioners contend that the District Court was "understandably incensed" by their "apparent contempt of its order," Petition at 6, and deprived "the sovereign State of North Carolina and its people of their day in court." Petition at 5. On the contrary, Petitioners had ample opportunity for years to comply with their constitutional obligation and to demonstrate that compliance to the District Court. During that time, the District Court was exceedingly patient with Petitioners. In finding that Petitioners had proved themselves unable or unwilling to implement their plan in a constitutionally adequate manner, the District Court noted: "This conclusion has not been reached lightly." 610 F.Supp. at 603. (A. 62.) Indeed, the District Court generously considered and thoughtfully responded to three motions for reconsideration by Petitioners. As the Court of Appeals emphasized:

Consistently with its role and function as a court, the district court could not sanction this extensive history of nonfeasance. Even when a sovereign state is a litigant, there comes a time when further delay cannot be tolerated. In this case, that time was well past."

813 F.2d at 1305, adopted by 841 F.2d 77.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

HIGHLIGHTS OF THE EVIDENCE SUPPORTING THE CONCLUSION OF THE DISTRICT COURT AND THE COURT OF APPEALS THAT PETITIONERS SHARE RESPONSIBILITY WITH THEIR COUNSEL FOR THEIR DECADE-OLD PATTERN OF NEGLECT AND DELAY THAT DEMONSTRATED THAT THEY WERE UNWILLING OR UNABLE TO IMPLEMENT THEIR PLAN IN A MANNER CONSISTENT WITH MINIMUM CONSTITUTIONAL REQUIREMENTS.

As they have in both the District Court and the Court of Appeals, Petitioners treat this case as if they committed only one default and that default only a procedural or timeliness one. Petition at 5, 6, 12. The District Court and the Court of Appeals, however, identified a dozen substantial defaults by Petitioners over the course of the several years of the compliance phase of this litigation. 610 F.Supp. at 599-601. (A. 54-59.) Moreover, they determined that those defaults fit a pattern of neglect and delay that included the one default that Petitioners acknowledge.

Petitioners try to fix the sole blame for the neglect and delay on Deputy Attorney General Jacob Safron. Petition at 6. Yet they make no effort to provide any explanation for his serious misconduct. They endeavor to characterize Safron as if he were running a rogue operation out of the basement of the North Carolina Department of Justice. They identify Mr. Safron as their "then-counsel of record" and append a footnote to say: "When these cases were initially consolidated in 1974, Mr. Safron was the only state attorney in the Attorney General's Office of North Carolina who represented the Department of Correction." Petition at 11 n.4.

By the time period relevant to the compliance phase of this litigation, however, Safron was Chief of the Corrections Section of the Attorney General's office and had seven or eight attorneys under his supervision in that Section. One of the attorneys on his staff was Assistant Attorney General Sylvia Thibaut. Safron reported to then Senior, now Chief, Deputy Attorney General Andrew A. Vanore, Jr.

The Department of Correction also had a legal staff. Ben G. Irons II was the Chief Legal Advisor. (A. 576.) Barbara A. Shaw and Kim Ledford were two of the attorneys on his staff. (A. 76.) Irons first began working for the Department of Correction in 1974. (A. 578.) Between 1976 and 1982 he worked

for Safron in the Attorney General's office. (A. 578.)

Irons kept himself well informed about this case. (A. 578.) In fact, he and his staff assisted Safron with it. (A. 577-578.) The District Court found that they "have been actively involved in this litigation." 657 F.Supp. at 1327. (A. 594.) Although Irons and Shaw were well aware of the history of Safron's handling of the case and were aware that he had not responded to the District Court's December 21, 1984 order, Irons testified by affidavit that he was satisfied with Safron's representation until he received the District Court's order of May 14, 1985. (A. 579.) The Secretary of Correction also testified that he was satisfied with Safron's representation of his department and "had no reason to question his work or his handling of this case." (A. 575.)

Two weeks after the District Court entered its order of May 14, 1985, Thibaut wrote a letter to the District Judge, advising him: "I am succeeding Jacob L. Safron as counsel of record for the Department of Correction in the above-referenced matter." She sent blind copies of the letter to the legal staff of the Department of Correction, Irons and Shaw. Two weeks later she filed a motion for reconsideration on behalf of Petitioners. After that motion was denied, Chief Deputy Attorney General Andrew A. Vanore, Jr., also entered an appearance on behalf of Petitioners.

Safron, however, continued to be in charge of the Corrections Unit where he supervised Thibaut. Indeed, he continued to play an active role in this case, although his name no longer appeared on the papers. The Attorney General's Office did not discipline him in any way. The Court of Appeals noted: "It is not without significance that the Attorney General still relies on Safron. We are aware that he was sole counsel representing North Carolina in another appeal which was argued during the December, 1986, session of the court." 813 F.2d at 1304 n.3. (A. 23.) The case to which the Court referred, argued in banc December 8, 1986, was West v. Atkins, 815 F.2d 993 (4th Cir. 1987). This Court granted certiorari in West, No. 87-5096, 108 S.Ct. 256 (1987), and Safron presented the oral argument on behalf of the Attorney General's office on March 25, 1988. 56 U.S. Law Week 3700. (This Court just handed down its decision on June 20, 1988.) The State's continued reliance on Safron and the lack of any discipline against him are evidence

that the State was in fact satisfied with his conduct of the case. Given the magnitude of the misconduct, it is reasonable to expect that the State would have reacted more strongly against Safron had his litigation strategy not been authorized.

The District Court was, of course, familiar with Safron's work. At the hearing, the Chief Deputy Attorney General pointed out that Safron had appeared before the District Judge many times. See also Garrison v. Ganey, No. 86-7516, (4th Cir.), Appendix pages 116-117, 169 in which the District Court found that Safron failed to respond to reasonable discovery requests in a manner similar to his conduct of this case described by the District Court in its May 14, 1985 order at 610 F.Supp. 599-601 (A. 54-59).

Petitioners have attempted to minimize their misconduct in this case to one single default, to fix responsibility for that misconduct on Safron, to offer a feeble apology from Safron alone, see A. 72-73, and somehow therefore to qualify for reconsideration as a matter of law. All of their affidavits addressed only Petitioners' failure to respond to the December 21, 1984 Order. Safron testified: "I admittedly failed to respond to this Court's December 21, 1984 order." (A. 73.) The Attorney General testified only that Safron committed a neglect of duty in failing to respond to that order. (A. 75.) Indeed, he testified that Safron "has had an unblemished record in handling similar civil litigation" during his seventeen years with the office." (A. 75.) They made no reference to the dozen other defaults that the District Court, in its May 14, 1985 opinion, which the Attorney General presumably read, described as typifying Petitioners' conduct of this case throughout. Moreover, they provided no explanation whatsoever for the one default they did address. As the District Court found, Petitioners "give no reasons as to why Safron's failure to comply with the court's order was excusable." 657 F.Supp. at 1324. (A. 571.)

The Attorney General's affidavit recited that Safron's "neglect of duty . . . was neither directed nor countenanced by me or any member of my staff." (A. 75.) Since Safron himself was a member of the Attorney General's staff, this statement is hard to accept. Moreover, the terms "directed" and "countenanced" are so general that it is impossible to know what they mean. They certainly appear to avoid disclosing to the court just what the Attorney

General did know and when he knew it. Safron also avoided giving any details about the processes in the Department of Justice in developing and implementing its litigation strategy in this case. (A. 73.)

This case was obviously of considerable importance to the Department of Correction and the Department of Justice as well as other state officials. It had, after all, been decided once by this Court. It also had its own intrinsic importance for the Department of Correction.

Safron did not keep secret the pattern of misconduct that characterized the compliance stage. Respondents filed a proliferation of documents describing that pattern. Petitioners have not asserted that they did not see those documents. The District Court filed a succession of orders exposing that pattern and attempting to remedy it, and Petitioners have not asserted that they did not see those orders. The Court of Appeals issued opinions in 1979 and 1984 that discussed that pattern and also made clear Petitioners' obligations, and Petitioners have not asserted that they did not see them. Clearly, Petitioners had an obligation to keep abreast of the case, see Nelson v. Coleman Co., 41 F.R.D. 7, 10 (D. S.C. 1986), and the evidence shows that they did so. Petitioners make no claim that Safron affirmatively misled them. Cf., Inryco, Inc. v. Metropolitan Engineering Co., Inc., 708 F.2d 1225, 1233 (7th Cir. 1983). Any official following the progress of this case even casually had to be familiar with the pattern of misconduct that characterized the compliance stage well before the District Court's order of December 21, 1984. Irons was certainly familiar with the case. Other Department of Correction officials have indicated clear awareness of various aspects of the case. Nevertheless, they testified in affidavits that they were satisfied with Safron's representation. There is no evidence that any official ever criticized Safron for the pattern of misconduct or ever suggested that he undertake a more responsible policy. There is no indication that any official ever demonstrated in any way that Safron was not doing exactly what Petitioners wanted. After the District Court issued its order of May 14, 1985, Petitioners substituted Thibaut for Safron and after the District Court denied their motion for reconsideration defendants also brought Vanore into the case. There is, however, no suggestion that that action represented any displeasure with Safron's conduct other than its lack of success. That action

was strategically designed to enable Petitioners to seek reconsideration by putting the blame on Safron. There is no evidence that Safron was disciplined in any respect. Petitioners' most recent and egregious violation fits into a pattern established by Petitioners of delay, defiance, and default -- never doing anything until forced to do so and then delaying as long as possible even if that meant ignoring deadlines and court orders. Moreover, on this most recent occasion, Petitioners did not just ignore one court order. For the 21 months from the date of the Court of Appeals' 1984 decision to the date of the District Court's May 14, 1985 decision, Petitioners did not appear in the District Court at all. During that time, they not only failed to respond to the District Court's December 21, 1984 Order, they also failed to respond to some seven submissions by Respondents. Certainly this conduct was sufficiently opprobrious to be characterized at least as "'flagrant bad faith'" and "'callous disregard'" by Petitioners of their responsibilities. Cf. National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976).

The highlights of the earlier phase of the pattern include:

(1) The District Court originally directed Petitioners to implement their plan within 120 days and to file a Certificate of Compliance upon final implementation. This Court affirmed that order on April 27, 1977. Petitioners, however, made no effort to advise the District Court or Respondents of the status of their implementation within 120 days of that decision, or to seek any extension of time. Indeed, Petitioners did not make any presentation to the District Court for some fourteen months. When they did finally respond, they did so by letter advising the District Court only that the law books were in place. They made no reference to the other critical components of their own plan: the utilization of the law libraries by the prison inmates and the staffing of the law libraries with trained inmate paralegals. They simply told the Court, contrary to the provisions of their own plan, that the purchase of the requisite books "constitutes full compliance." Moreover, they sent the letter ex parte. (A. 2.) They did not send a copy of it to Respondents or their counsel or otherwise notify them of their action. (A. 2.) Even after the District Court directed Petitioners to send a copy to Respondents, Petitioners did not do so.

(2) On remand from the Court of Appeals' 1979 decision requiring Petitioners to establish the satisfactory implementation of their plan, Petitioners did nothing in that regard.

(3) Accordingly, Respondents undertook to try to develop the information that Petitioners had the responsibility to provide, by serving interrogatories and requests for production on defendants. See 741 F.2d at 68 (referring to the extensive efforts made by Respondents "through counsel since Harrington I was decided to obtain information.") (A. 9.) Although Petitioners had the obligation to provide the requested information without discovery efforts by Respondents, they even ignored those efforts by Respondents to assist them in fulfilling their obligation. See 741 F.2d at 67 (referring to Respondents' "efforts, through a series of petitions and motions, to ensure compliance with the Supreme Court's mandate.") (A. 8.)

Respondents served interrogatories on Petitioners on July 26, 1979. Petitioners did not respond to them in any way. As the deadline for answering passed, Petitioners did not file any answers or objections or request an extension of time, formally or informally. After three months, Respondents filed a motion for an order compelling answers. Then Petitioners filed a motion for an extension of time until November 1, 1979 to answer the interrogatories. The District Court granted that motion, but that date passed with no answers or objections or further application for extension being filed. Accordingly, upon the request of Respondents, the District Court scheduled a hearing for June 3, 1980 -- seven months after the extended due date -- on Respondents' motion for an order compelling discovery. Five days before the scheduled hearing, Petitioners filed answers to the interrogatories. Counsel for Respondents received those answers in the mail on June 2, 1980, literally on the eve of the scheduled hearing.

The answers that Petitioners filed contained information through October, 1979 and no information for the period after that. The accompanying affidavit showed that they had been prepared by November 6, 1979. Petitioners offered no explanation for their delay in filing those answers for seven months after having them ready, or for filing them only on the eve of the hearing scheduled to inquire into their failure to file them. Petitioners simply held the answers as long as they could delay and filed them only under pressure from

Respondents and the District Court.

(4) By January of 1982 Petitioners still had made no effort to comply with this Court's decision requiring them to demonstrate their compliance with their plan. In a further effort to achieve the objective of having Petitioners comply with their constitutional obligation, Respondents on January 28, 1982 filed a Motion for an Order that Defendants Comply with their Plan As Approved By This Court and Submit A Certificate of Such Compliance.

Characteristically, Petitioners ignored that motion. Two and one-half months later, on April 15, 1982, the District Court issued an order directing Petitioners to show cause within ten days of receipt of the order why Respondents' motion should not be granted. Petitioners were only a couple of days late in responding to that order. On May 3, 1982 they filed a document entitled "Response to Plaintiffs' Motion for 'A Professional and Comprehensive Certificate of Compliance.'" That document did not, however, respond to Respondents' motion or to the District Court's order. As the District Court accurately described it: "In that response, [Petitioners] basically summarized their previous filings." 610 F.Supp. at 600. (A. 56.)

The District Court then on May 7, 1982, apparently satisfied that Petitioners were not in compliance, ordered the parties within 30 days to submit alternative plans for Petitioners to achieve compliance.

Respondents promptly complied with that order. On May 28, 1982 Respondents filed a Response in which, noting that "(p)resumably, this order represents a conclusion by the Court that the [Petitioners] have not complied with the earlier order of the Court," for the first time they formally recommended that the District Court "order [Petitioners] to provide a legal services program for prisoners."

Petitioners never complied with the District Court's order or responded to it in any way.

The District Court scheduled a hearing for June 24, 1982. It then continued the hearing until August 20, 1982 and then again to September 3, 1982. During all that time Petitioners filed no response to the District Court's order. They took no advantage of the two continuances of the hearing date either to demonstrate that they were in compliance or to submit a new plan in accordance with the District Court's order. They submitted nothing

whatsoever.

On September 3, 1982, the date scheduled for the hearing, the District Court had several motion hearings on its docket. The District Court was not prepared for an evidentiary hearing nor had Petitioners given any reason for it to expect an evidentiary hearing. Petitioners had filed no response to Respondents' motion or to the District Court's order. Nevertheless, Petitioners surprised the District Court and Respondents by presenting a witness in an effort to show compliance. Petitioners offered no explanation for their failure to respond to the District Court's order or their unusual procedure of calling a witness to show compliance at a hearing on a different issue (determining alternative plans for Petitioners to achieve compliance) where witnesses had not been anticipated. Nevertheless, the District Court generously entertained their procedure.

Of course, as the Court of Appeals held in its 1984 decision in this case, Petitioners did not demonstrate compliance at this hearing. This Appendix will comment further on that at paragraph 7 below. At this point, however, it is enough to observe simply the pattern of conduct of the case on behalf of Petitioners.

(5) On September 9, 1982 Respondents served another set of interrogatories on Petitioners. Petitioners ignored them. On October 21, 1982, Respondents filed a motion asking the District Court to order Petitioners to answer the interrogatories. Still Petitioners made no effort to prepare answers to those interrogatories or to seek an extension of time to do so. They did not even respond to the motion, ignoring it as they had the interrogatories.

The District Court waited until December 1, 1982, and then granted Respondents' "unopposed motion" to compel discovery and directed Petitioners "to answer the interrogatories on or before December 10, 1982." One week later Petitioners began to prepare their answers. That was three months after the interrogatories were served, two months after the answers were due, and only two days before the deadline set by the District Court in its order for the answers. Petitioners then filed a motion for an extension of time. In that motion, Petitioners made no effort to explain the three-month period in which they totally ignored the interrogatories; they simply described the

professional activities of their counsel on December 6, 9 and 10 that would interfere with his preparation of the answers.

(6) In the 1984 appeal in these cases, one issue involved the denial of law library access to inmates on segregation status. Petitioners defended this restriction on the ground that "under applicable prison regulations, inmates are entitled to a forty-eight hour release from segregation at the end of each fifteen-day period spent in segregation." 741 F.2d at 68. (A. 10.) Nevertheless, while the cases were under submission to the Court of Appeals -- as to that issue, *on* the basis of that provision in the regulations -- Petitioners amended their regulations to eliminate that provision. Nevertheless, Petitioners did not take any steps to notify the Court of Appeals or Respondents of that amendment. Three months later the Court of Appeals issued its decision in which it relied on the now-revoked provision to rule in favor of Petitioners on that issue. 741 F.2d at 69. (A. 11.) Even after receiving that opinion Petitioners did not notify the Court of Appeals, the District Court or Respondent that they had revoked the provision that the Court of Appeals as well as the District Court had relied on.

(7) A critical component of the plan that Petitioners had been ordered to implement provided for the training of inmate paralegals.

Petitioners held the first training session on March 28, 30 and 31, 1978. Only half of the time was devoted to training inmate paralegals. The rest of the time was devoted to training correctional officers. The correctional officers were not going to provide any assistance to inmates. Accordingly, the time devoted to their training is irrelevant to the training of inmate paralegals required by Petitioners' plan. The session for the inmate paralegals consisted of seven hours of instruction on March 28, three and one-half hours on March 30, and three and one-half hours on March 31. The March 28 session did not cover legal research but canvassed elementary principles of criminal procedure. The March 30 half-day session was the only one covering legal research techniques. The March 31 half-day session was devoted to going over problems and answering questions.

Petitioners did not conduct another training program for over three and one-half years. Indeed, they did nothing about scheduling another session until long after Respondents began inquiring about their training program

through interrogatories. On September 30, 1980, Petitioners revealed in their Response to Plaintiffs' Second Set of Interrogatories that only two of the thirty-one inmates staffing the prison law libraries had participated in the training session. Yet it was not until November 20, 1980 -- two months after revealing in their answers to those interrogatories that all but two of their inmate law library staff had no paralegal training -- that Petitioners even began any effort to arrange a second training session.

On February 17, 1981, the District Court issued an Order, finding that Petitioners had failed to meet their "obligation to provide inmates assigned permanent library duties with training 'to the best extent possible' in legal research techniques" and ordering Petitioners "to submit to the court within ninety days of this date a statement of the means by which [Petitioners] will promptly comply with this aspect of the library plan."

Petitioners did not respond to that Order until six months later. On August 7, 1981 -- three months late -- Petitioners filed an Affidavit by Lynn C. Phillips, Chief of Program Services for the North Carolina Division of Prisons. Phillips testified in that affidavit that Petitioners had scheduled a "second legal library workship" for October or November, 1981, 40 months after the first training session. Phillips also testified that he had assigned Jennings W. Stevens, Librarian II, Chief of Library Services for the Department of Correction, the responsibility of developing the second "legal library workshop as well as an on-going on-the-job training program." Phillips further testified that the second workshop, like the first, would last four days for both inmates and correctional officers who would not assist inmates. Thus the time for training inmates would be as limited as in the first program. Future workshops, however, were planned to last ten eight-hour days over the course of two weeks. "It is proposed," he represented, "that after the four day workshop in October or November of 1981, this longer, more intensive in-service training legal library workshop will be held within twelve to eighteen months. Our tentative schedule, subject to revision, proposes that the two week workshops be held at a minimum of every two years. Additionally, shorter workshops may also be held in the two year interval between the two-week workshops, either to reinforce the training in previous workshops or to train new personnel assigned to the law libraries." Phillips

also described the use of on-the-job training. That consisted of instruction, "wherever possible," by the departing officer or inmate of his replacement and of the replacement "doing legal research and the use of legal materials."

Petitioners did not follow that submission with any further information to the Court. On January 28, 1982, Respondents filed a Motion for an Order that Defendants Comply with Their Plan. In that motion, Respondents advised the District Court that they understood that Petitioners had conducted a four-day legal workshop for inmates and officers at the end of October 1981,* but that they did not plan their first full training session for at least another year. Petitioners did not respond to that motion and still did not come forward with any additional information. On April 6, 1982, counsel for Respondents wrote to the District Court, advising that Jennings W. Stevens, the librarian whom Phillips identified as being responsible for developing the workshop and on-the-job training, had changed jobs and that the two persons who had presented the first two workshops were not available for any further training sessions. Respondents therefore asked the Court to require Petitioners to demonstrate "precisely how [they] will begin to comply with [their] commitment to provide trained inmate paralegals for the prison law libraries."

On April 15, 1982, the District Court ordered Petitioners to show cause within ten days why Respondents' motion should not be granted, or the motion would be granted. Petitioners on April 30 filed a document entitled "Response to Plaintiffs' Motion for 'A Professional and Comprehensive Certificate of Compliance.'" That document did not respond to the points, which Respondents raised, that Petitioners had not complied with their obligation to train inmate paralegals, that their plan for doing so was not adequate, and that the professionals that Petitioners were relying on for their inadequate plan were not available. Instead, as the District Court summarized, Petitioners simply asserted that a Certificate of Compliance was unnecessary.

On May 7, 1982, the District Court, implicitly finding that Petitioners had not complied with their plan, "ordered that [Respondents] and

*Petitioners had not even bothered to inform the Court, or Respondents, about that development.

[Petitioners] within 30 days of receipt of this order submit satisfactory alternatives to the programs scheduled for the training of paralegals." Petitioners never responded to that Order, and never complied with it in any way. The Court set the matter for hearing on September 3, 1982. This was the hearing at which Petitioners surprised the Court and Respondents by presenting a witness, Jerry Price, Chief of Educational Services for the North Carolina Department of Correction. Price testified that Petitioners had then -- five and one-half years after this Court's decision -- provided only two legal library workshops, both of only four days' duration, the first on March 28-31, 1978, the second on October 27-30, 1981. He also testified that Petitioners relied considerably on on-the-job training. Petitioners were, however, in the process of hiring a new librarian to replace Stevens, and that new librarian would be responsible for presenting a third workshop. Price said that "hopefully" that workshop would be held "by the end of September," which was 27 days away, even though the librarian responsible for it had not yet been hired. He said that he had a "definite commitment" from the law librarian at North Carolina Central University to assist in conducting the workshop, and needed to find one or two other individuals to do so. On cross-examination, Price admitted that he had just begun two weeks before the hearing to write letters to professionals about participating in the program. In addition to the law librarian at North Carolina Central University, Price had written to professors at Meredith College and Campbell University. He did not know the names, positions or training of those professors.

Price testified that Petitioners had approximately 30 inmate paralegals. Of those, only 7, less than 25%, had ever attended a workshop.

At the conclusion of the hearing, the District Court ordered Petitioners to file a statement detailing their specific efforts to comply with each provision of the 1974 plan. Petitioners did file such a response on October 1, 1982. In that response, Petitioners conceded, in an understatement, "that the training program was not functioning at the level desired by the Department of Correction." Petitioners further advised that they had hired a librarian who would "assume the position and be fully responsible for the operation of the prison law library system on or before October 15, 1982." Petitioners' response did not refer to the planned workshop that Price

testified would "hopefully" be held by the end of September, to the "definite commitment" from the law librarian at North Carolina Central University to assist in conducting it, or to the Meredith College and Campbell University professors who had been approached by letter about participating, but apparently that whole hasty arrangement that so solemnly formed the crux of Price's testimony had been abandoned without notice to the Court or Respondents. Instead, Petitioners now asserted, the Department of Correction had contracted with the Durham Technical Institute to provide three five-day, rather then ten-day, law library workshops on an annual basis. Again, the program would be provided to correctional officers as well as inmates, so only half of the time would actually be for inmate paralegal instruction.

The response did not describe the amount of time to be devoted to the training of inmate paralegals. It also did not include a schedule. In the past, the first day of the training program was for inmate transportation to the site of the program and not for the actual program. In any event, the planned programs were inadequate even by the standards established by Petitioners. In August of 1981 Petitioners represented that they intended to provide a "two week workshop to be held at a minimum of every two years," meeting for eight hours a day for five days a week for each of the two weeks, with shorter workshops to be held in the interval between the two-week workshops. Petitioners have never planned let alone provided a single training program meeting their own standard.

(8) The District Court entered its Order on December 21, 1984 requiring Petitioners to "submit, within thirty days, any materials which they contend show that they are or shortly will be in compliance with their plan." That response was due on January 20, 1984.

Irons testified that when he received that order he "directed an attorney on my staff, Barbara A. Shaw, to work with Mr. Safron to develop the information requested." (A. 577.) Shaw testified that she "contacted people throughout the Division of Prisons who were responsible for the management of the law libraries and the training of law library assistants" and "I received voluminous materials in response." (A. 77.) Shaw testified that she "notified Mr. Safron that I had received all these materials and asked for instruction as to what he needed to respond to the December order. He told me

to carefully review the materials in preparation for a meeting with him. I did carefully review the materials, but he did not schedule a meeting." (A. 77.) Shaw further testified that on January 14, 1985 she sent Safron a handwritten "transmittal slip" asking him to "call me about affidavits necessary for a response in the Bounds case." (A. 78.)

Irons testified that Shaw reported to him that "when she contacted Mr. Safron, he delayed discussion of the matter." (Emphasis added). (A. 577.) He did not say when that occurred, but it must have been close to the deadline for Petitioners' response, probably after January 14, 1985. Irons testified that he "called Mr. Safron and informed him that Ms. Shaw had prepared the information necessary to respond to the court's order. Mr. Safron informed me that he would let me or Ms. Shaw know when the material was needed." (A. 577.) Irons did not disclose the date of that conversation and disclosed no more of his conversation with Safron than that short statement. Irons never said that Safron assured him that he would timely respond to the order or even that he asked Safron to do so. Had Safron given such assurance or had Irons insisted on timely compliance or communicated to Safron that the Department regarded that as important, surely Irons would have included that in his affidavit. He did not, and in light of the subsequent conduct of both Irons and Safron it is more likely that they agreed that Safron not respond in timely fashion.

Irons testified: "I heard nothing from Mr. Safron regarding this matter until after I received [the district] court's order of May 14, 1985." (A. 577-578). Shaw testified that as of the date of her affidavit she was still in possession of the voluminous material she had gathered. (A. 78.) Neither Irons nor Shaw testified that they ever contacted Safron about the matter again. Neither mentioned whether they saw Safron on other matters or whether they discussed this matter among themselves during the months of delinquency. Whatever the contents of the conversation betweens Irons and Safron, Irons and Shaw seemed content thereafter with the situation despite the facts that they received no information that Safron had complied with the December 21, 1984 order and that Shaw still had in her possession at the Department of Correction the "voluminous meterials." Thus, they knew or certainly should have known that no response had been filed months after the passing of the

deadline. They had not received from Safron a copy of any response; Shaw had in her possession the materials they thought were needed for the response. Irons knew that Safron had on many occassions withheld submitting responsive material until absolutely forced to do so, defying deadlines and court orders in the process. Whatever the reason that Shaw did not pursue the matter and that Irons did not even ask Safron about it again over all those months after the deadline, if they did not, must lie in the undisclosed contents of Irons' conversation with Safron. Certainly, they showed an exceptional lack of concern for a significant matter. Despite this situation and despite the history of misconduct of this case that the Court of Appeals had noted in opinions that Irons had read, Irons testified that he "sincerely believed that Mr. Safron had provided adequate legal representation to the Department of Correction in this case until I received [the district] court's order of May 14, 1985." (A. 579.)

(9) Petitioners had ample opportunity in the District Court to explain the situation. The documents they filed with their first motion for reconsideration made no serious effort to do that. The Safron affidavit was barren of any explanation. (A. 72-73.) No self-respecting Court could have been satisfied with the Safron affidavit. The Shaw affidavit added little detail. (A. 76-78.) The affidavit from the Attorney General was also vague. (A. 74-75.) Petitioners did not then submit an affidavit addressed to this issue from any other attorney on Safron's staff, from Safron's supervisor, the Chief Deputy Attorney General, from the former Attorney General, from the Secretary of Correction (although he did submit an affidavit regarding the photocopying policy) or from the previous Secretary of Correction.

When the District Court denied Petitioners' first motion for reconsideration, Petitioners filed two more and the District Court gave both of them serious consideration. During this time Petitioners filed the affidavits of Irons and the current Secretary of Correction. They knew then that the District Court had found their first affidavits insufficient. Yet despite the generous reconsiderations accorded to them by the District Court they never came forward with an adequate affidavit by Safron. Instead, they presented a second affidavit by the Secretary of Correction that made no direct statement about his knowledge of the status of this case and the

affidavit by Irons that added some detail but disclosed that after Irons discussed the matter with Safron the Department demonstrated no concern whatever about Safron's failure to file a response for months after the deadline.

The consistent policy of the Department of Correction throughout the 15 years of this litigation has been to resist its constitutional obligation. It has not refrained from expressing its hostility to that obligation or from using every avenue of delay, legitimate and improper, to avoid complying with it. Petitioners' affidavits never addressed that history in any respect, studiously ignoring it in those that praised Safron's work. The District Court was aware of the pattern of Petitioners' attitude towards and conduct of this case and was aware that it would be consistent with that pattern for Petitioners to decide not to make any submission until they had dragged out the process by delay as long as they could. When Safron did not timely respond to the December 21, 1984 order he might have been acting simply in reliance on the established policy that had governed his conduct of the litigation throughout, and that might then have appeared to be succeeding, or he might have acted in specific consultation with officials in the Attorney General's office or the Department of Correction or both. The one telephone call between Safron and Irons that defendants have disclosed might have included an agreement to persist in the policy of intransigence and foot-dragging. The affidavits do not allay that possibility. Without going so far as to embrace that possibility, however, it is crystal clear that Petitioners did not act as diligent and conscientious clients in what was obviously not a routine but an important case that the State had lost in this Court once and in the Court of Appeals twice since then. The consistency of the pattern that the District Court and Court of Appeals noted demonstrates that the failure to explain the situation supports the conclusion of the District Court and the Court of Appeals that Petitioners did not carry their burden on this issue.

APPENDIX B

SEVEN FACTUAL ASSERTIONS IN THE PETITION THAT EITHER (A) HAVE NO SUPPORT IN THE RECORD, OR (B) ARE CONTRARY TO THE FINDINGS OF THE DISTRICT COURT AND THE COURT OF APPEALS.

Rule 23 (1)(e) of the Rules of the Supreme Court requires that the Petition contain "A concise statement of the case containing the facts material to the consideration of the questions presented." See also Rule 56(2)(4), Rules of the Supreme Court. The Petition in this case does not comply with that Rule. The Statement of the Case is one-sided and incomplete. It contains factual assertions that are contrary to the conclusions of the courts below or that are unsupported by the record or that are misleading. Those assertions are:

(A) Petition, page 4: ". . . rather than provide law libraries as it [the State of North Carolina] has done for the past eleven years."

The District Court found that Petitioners' "plan for assuring adequate law library facilities has been in existence for over a decade, yet they have consistently failed to implement that plan in a constitutionally adequate manner." 610 F.Supp. at 602. (A. 60.) The District Court also found: Petitioners "are not in compliance with their constitutional obligation to provide inmates of the North Carolina prisons with adequate assistance in their access to the courts. . . . [E]leven years after the court's order, the state has failed to implement that plan. It has proven itself unable or unwilling to insure that its law libraries are constitutionally adequate to meet its inmates' needs." 610 F.Supp. at 603, 606; see also, 813 F.2d at 1301. (A. 62, 67; see also A. 18.)

The Petition nowhere includes even a reference to any of the relevant findings of the District Court or the Court of Appeals.

(B) Petition, Page 5: ". . . the evidence, which was timely made available to their former counsel but which unbeknownst to the defendants was not presented to the district court . . . . their former counsel's dereliction of duty, of which the defendants were unaware, and without reason to be aware." See also Petition, Page 12: "Mr. Safron simply did not present evidence of compliance to the District Court, and he never advised the

defendants that it was his intention to abandon them." See also, Petition, Page 1, Questions Presented for Review, Question (1).

The District Court found, and the Court of Appeals agreed, that Petitioners' failure to respond to the December 21, 1984 order was not an isolated incident. "'Clearly, [Petitioners] knew or should have known that counsel had a history of failing to respond to the court's orders. . . . [T]he court concludes that [Petitioners] must share the responsibility for counsel's failure . . . .'" 841 F.2d at 78. (A. 29.)

See also Appendix A, especially Paragraphs 8 and 9.

The Petition nowhere includes even a reference to any of the relevant findings of the District Court or the Court of Appeals, or to any of the evidence supporting those findings. See page 6 of the Petition, which selectively misrepresents the evidence discussed at paragraphs 8 and 9 of Appendix A, and does not mention that the courts below found against their position on this factual issue.

(C) Petition, Page 8: "The lower courts acknowledged that defendants were most likely in compliance with their law library plan . . . ." Petition, page 6: "Simply stated, the district court found the defendants out of compliance because of Mr. Safron's failure to present to the court the evidence . . . ." Petition, page 7: "The plaintiffs have never contradicted the defendants' evidence of compliance."

The District Court expressly found that Petitioners were not in compliance. 610 F.Supp. at 602, 603, 606. (A. 60, 62, 67.) In denying Petitioners' first motion for reconsideration, the District Court did observe: "While the materials attached to [Petitioners'] motion do indicate that the state was making efforts to comply with its plan . . . ." 657 F.Supp. at 1324. (A. 571.) "Making efforts to comply" does not amount to "most likely in compliance." Even if it thought that it had evidence that Petitioners were making efforts to comply with their plan several years and two appeals after this Court's decision, the District Court did not disturb its finding that Petitioners were in fact not in compliance. Moreover, the District Court made clear that its finding that the State was not in compliance was based on the entire history of the State's decade-old pattern of neglect and delay, and not simply Petitioners' failure to present evidence on one occasion, serious as

that was: "The state's failue to comply with the December 1984 order was quite simply the straw that broke the camel's back and showed that the state has been unwilling or unable to comply with a plan submitted and approved more than ten years ago." 657 F.Supp. at 1324, (A. 572.) Moreover, Respondents advised the District Court (in Plaintiffs' Memorandum in Opposition to the State's Motion for Reconsideration at 22-23) and the Court of Appeals (in the Brief for Appellees at 36 n.1 and in the Answer to Petition for Rehearing at 12) that they disputed Petitioners' claim of compliance. Because the District Court properly denied Petitioners' motion for reconsideration on the basis of the insufficiency of Petitioners' showing, it held no hearing at which Respondents might have contested Petitioners' purported showing of compliance. As the District Court well knew and noted, the history of this case was replete with instances of Petitioners delaying the filing of purported compliance papers (or testimony) as long as possible, then filing voluminous materials that an examination proved inadequate, and of making promises of compliance and then reneging on them without notice to the court or to Respondents. See Appendix A, especially Paragraphs 6 and 7. Thus, the mere filing of voluminous records by Petitioners does not demonstrate compliance. Respondents have taken the positive position in each of the courts below that Petitioners are in fact still not in compliance.

(D) Petition, page 6: The District Court's "finding of noncompliance was entered without the district court receiving any evidence of noncompliance and without the plaintiffs or the district court ever attempting to compel the defendants to provide evidence of compliance."

First, the burden was on Petitioners to show compliance. At the time the District Court entered its finding of noncompliance, the Court of Appeals had twice concluded that Petitioners had failed to show that they were in compliance, and Petitioners had not presented any further showing to the District Court. There can be no dispute that the finding of noncompliance is unassailable on the record before the District Court at the time it made that finding.

Secondly, although Petitioners had the burden of coming forward with a showing of noncompliance, Respondents by several motions attempted to, and the District Court by order did in fact, compel Petitioners to do so. Respondents

simply failed to respond to the District Court's Order of December 21, 1984 or to any of the motions that Respondents filed both before the date of that order and afterwards. They were compelled to do so, yet failed in their own responsibility.

(E) Petition, page 11: "(U)nlike a private citizen, the state officials in this case had no choice of counsel . . . ."

That is contradicted by the Petition itself, at page 7: "Immediately upon learning of the May 14, 1985, district court order, North Carolina Attorney General Lacy Thornburg . . . appointed new counsel to represent the defendants." Actually, all that the record shows happened is that Ms. Sylvia Thibuat notified the Court that she was representing petitioners, but Safron continued to be her supervisor and continued to participate actively in the case.

Nothing in the record supports the statement that the state officials who are Petitioners "had no choice of counsel." On the contrary, their affidavits praise Safron so highly that they imply that he was their choice as counsel.

(F) Petition, page 11 n.4: "When these cases were initially consolidated in 1974, Mr. Safron was the only state attorney in the Attorney General's Office of North Carolina who represented the Department of Correction."

1974 was not the relevant time period. By the time of the compliance phase of this litigation, Safron was the Chief of a section with seven or eight attorneys. Moreover, the Department of Correction had its own staff of attorneys headed by Ben Irons II who had previously served under the supervision of Safron in the Attorney General's office and who, as the District Court found, had "been actively involved in this litigation." 657 F.Supp. at 1327. (A. 594.)

(G) Petition, page 13: "Fourth, the harshness of the district court's remedy is evident in the drastic difference in cost of the State's law library plan, $60,000.00 a year, compared to the estimated cost of the court's attorney assistance plan, $360,000.00 a year."

Nothing in the record supports any statement about the cost of the State's current plan. There is no evidence to support the $60,000 figure or any other figure, or any indication of what that figure is based on or what is included. Of course, the lower courts have found that the State's program has never been

adequate to satisfy the state's original plan, so any cost figure is irrelevant.

With regard to Petitioners' projected cost for complying with the order under review, there is no basis for that either. The District Court's order "concludes that the actual budget of the program should be left to the defendants, subject to court review should it appear that the amount budgeted clearly is insufficient to operate a viable program with ten attorneys." 657 F.Supp. at 1332.*

When this case was before this Court in 1977, Petitioners argued that their plan for prison law libraries staffed with trained inmate paralegals was too expensive for the State's limited resources. Bounds v. Smith, 430 U.S. 817 (1977), Brief for Petitioners at 13. Now they argue that the legal services program ordered by the District Court will also be too expensive. The District Court order, of course, embraced the plan submitted by Petitioners after Respondents demonstrated considerable flexibility and willingness to compromise with regard to the size and the cost of the program. Moreover, Petitioners' figure ignores the evidence presented to the District Court that a legal services program may be more cost-effective than the original plan. Attorneys may weed out frivolous claims by explaining to the prisoners why they have no merit, and may negotiate with prison officials at administrative levels on behalf of prisoners with substantial claims. The program would also save the State money in several other respects -- such as by the program foregoing § 1988 attorney fee awards, by the attorneys seeking to correct any inaccurate Department of Correction records to assure timely release of inmates, and by the program saving the cost of appointing counsel in post-conviction cases that it would now handle. Respondents demonstrated to the District Court that the program would be a service to the state, to the Attorney General's office and to the courts, as well as to the inmates. Moreover, Legal Services of North Carolina, which is to administer the

*After the in banc decision of the Court of Appeals affirmed the District Court's Order, Respondents filed a Motion for Clarification of Stay Order asking the District Court to order Petitioners to submit their proposed budget at this time. Petitioners opposed that motion on the ground that they were expending all their energies in this matter in preparation of the Petition and would present a proposed budget to the District Court within 30 days of a denial of the petition or an affirmance by this Court. Thus, Petitioners represented to the District Court that they have no budget on which to base the $360,000 figure.

program, agreed to make a substantial contribution to the program in the form of four attorney positions plus the use of its state-wide facilities to help Petitioners meet their constitutional obligation. Petitioners' conclusory cost figure overlooks all the cost-saving aspects of the new program.

CERTIFICATE OF SERVICE

I hereby certify that I have served the enclosed Brief in Response to the Petition for Certiorari on all parties required to be served by mailing a copy, first class postage prepaid, addressed as follows:

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June 22, 1988

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